IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Civil Revision No. 6134 of 2005 (O&M)

Date of Decision: 13.09.2006

Northern India Stock Exchange Limited & Ors.

...Petitioners

Vs.

Tarsem Diwan & Ors.

...Respondents

CORAM Hon'ble Mr.Justice Vinod K.Sharma

Present: Mr. P.K.Kukreja, Advocate,
for the petitioner-applicant.

Mr. Anil Aggarwal, Advocate,
for respondents No.1 to 8.

Mr.S.K.Sharma, Advocate,
for respondent No.9.

Vinod K.Sharma, J. (Oral)

CM No.16956-CII of 2006

Civil Misc. No.16956-CII of 2006 is allowed. The main case is restored to its original number and taken up for hearing.

CR No. 6134 of 2006

Respondents herein had filed a suit for declaration that the election of the Directors held on 24.8.2005 at the Annual General Meeting of M/s Northern India Stock Exchange Limited (defendant No.1) herein is illegal, null and void being violative of the express provisions of the Companies Act, 1956 (for short the Act) and Memorandum and Articles of Association of the Company and for a consequential relief of permanent prohibitory injunction restraining defendant Nos. 2 to 6 to act as Directors of the Company and defendant No.2 from acting as President of the Company and also restraining defendant No.9 (i.e. The Registrar of Companies, Punjab, Himachal Pradesh and Chandigarh) from taking on record Form No.32 and annual return dated 24.9.2005 and further for grant of permanent mandatory injunction directing the defendants to conduct the elections of Directors afresh as per the provisions of the Act and Memorandum and Articles of Association of the Company.

On notice having been served the petitioners-defendants No.1, 2 and 5 to 8 filed application under Section 8 of the Arbitration and Conciliation Act, 1996 (for short the 1996 Act) for stay of the suit and referring the parties to arbitration. It was pleaded in the application that the plaintiffs had claimed themselves to be the members and Directors of defendant No.1 and were relying upon Memorandum and Article of Association of the company of which copy was placed on record thereof. It was also claimed that no notice under section 80 of the Code of Civil Procedure was issued to defendant No.9 and the plaintiffs had not made any effort for service for this defendant. The case of the petitioners herein was that under Article 138 of the Articles of Association of the company, the dispute between the parties was required to be referred to the Arbitrator to

be appointed by defendant No.1 and therefore, the Civil Court had no jurisdiction to adjudicate the matter in dispute and therefore, the said suit was not maintainable. A copy of the arbitration clause was also placed on record.

The said application was contested by the plaintiff-respondents where he denied the averments made by the petitioners herein and averred that the application was not maintainable because the petitioners herein had violated statutory provisions of Sections 257 and 258, 172 (1) and 173 (2) etc. of the Act besides violating Articles 109 and 110 of Articles of Association of the company.

It was alleged that seven nomination forms were illegally rejected out of 8 constants on flimsy grounds thereby depriving them of their legal right for contesting the election of the Directors of the company. It was further claimed that after rejection of seven nomination papers five candidates were left for the post of four directors but the defendant instead of holding election by secret ballot declared five candidates elected without following the procedure of election. The claim of the respondent-plaintiffs in violation of the Act was not arbitral matter and therefore, could not be referred to the arbitration. It was also claimed that clause 138 of the Memorandum and Articles of Association of the company was not restrictive in nature and dealt with the dispute between the members arising out of bargain, dealings, transactions or contracts and not to the violation of the Act. The dispute was claimed to be pertaining to directorship of the companies and not rights of the members inter se and therefore, claimed that the application be dismissed.

Article 138 of the Articles of Association of the company reads

asunder:-

> " All claims, complaints, differences and disputes between the members arising out of or in relation to any bargains, dealings, transactions or contracts made subject to the rules, Bye-laws and Regulations of the Exchange or with reference to any thing incidental thereto or anything to be done in pursuance thereof and any question or dispute whether such bargains, dealings, transactions or contracts, have been entered into or not shall be subject to arbitration as provided under the Bye-laws and Regulations and referred to the Arbitration Committee appointed by the Board under Article 123".

The learned Trial Court came to the conclusion that the subject-matter of dispute was not covered under Article 138 of Articles of Association of the company and therefore, the application being without any merit was liable to be dismissed.

The contention of the learned counsel for the petitioners is that once arbitration agreement between the members was admitted then it was not open to the learned Trial Court to have gone into the merit or to see whether the matter was covered or not as according to the provisions of the Act, it is for the Arbitrator to adjudicate upon his jurisdiction and therefore, the impugned order was against the settled law. Leaned counsel for the petitioners in support of his contention placed reliance on the judgment of Hon'ble Supreme Court in **Hindustan Petroleum Corpn. Ltd. Vs. M/s Pinkcity Midway Petroleums, AIR 2003 SC 2881.** He made reference to para No.15 of the said judgment which reads as under:-

"15. The question then would arise: what would be the role of the Civil Court when an argument is raised that such an arbitration clause does not apply to the facts of the case in hand? Learned counsel for the appellant contends that it is a matter which should be raised before the arbitrator who is competent to adjudicate upon the same and the Civil Court should not embark upon an inquiry in regard to the applicability of the arbitration clause to the facts of the case. While learned counsel appearing for the respondent contends that since the applicability of the arbitration clause to the facts of the case goes to the very root of the jurisdiction of the reference to arbitration, this question will have to be decided by the Civil Court before referring the matter to arbitration even in cases where there is admittedly an arbitration clause. The answer to this argument, in our opinion, is found in Section 16 of the Act itself. It has empowered the Arbitral Tribunal to rule on its own jurisdiction including rule on any objection with respect to the existence or validity of the arbitration agreement. That apart, a Constitution Bench of this Court in Konkan Railway (supra) with reference to the power of the arbitrator under Section 16 has laid down thus:

> "It might also be that in a given case the Chief Justice or his designate may have nominated an arbitrator although the period of thirty days had not expired. If so, the Arbitral Tribunal would have been improperly

> constituted and be without jurisdiction. It would then be open to the aggrieved partly to require the Arbitral Tribunal to rule on its jurisdiction. Section 16 provides for this . It states that the Arbitral Tribunal may rule on its own jurisdiction. That the Arbitral Tribunal may rule "on any objections with respect to the existence or validity of the arbitration agreement" shows that the Arbitral Tribunal's authority under Section 16 is not confined to the width of its jurisdiction, as was submitted by learned counsel for the appellants,but goes to the very root of its jurisdiction. There would, therefore, be no impediment in contending before the Arbitral Tribunal that it had been wrongly constituted by reason of the fact that the Chief Justice or his designate had nominated an arbitrator although the period of thirty days had not expired and that, therefore,it had no jurisdiction."

Learned counsel for the petitioners, thereafter, placed reliance on the judgment of this Court in **P.Anand Gajapathi Raju and others Vs. P.V.G. Raju (died) and others AIR 2000 SC 1886.** He referred to para No.8 of this judgment which reads as under:-

> "8. In the matter before us, the arbitration agreement covers all the disputes between the parties in the proceedings before us and even more than that. As already noted, the arbitration agreement satisfies the requirements of Section 7 of the new Act. The language of Section 8 is preemptory. It

> is therefore, obligatory for the Court to refer the parties to arbitration in terms of their arbitration agreement. Nothing remains to be decided in the original action or the appeal arising therefrom. There is no question of stay of the proceedings till the arbitration proceedings conclude and the Award becomes final in terms of the provisions of the new Act. All the rights, obligations and remedies of the parties would now be governed by the new Act including the right to challenge the Award. The Court to which the party shall have recourse to challenge the Award would be the Court as defined in clause (e) of Section 2 of the new Act and not the Court to which an application under Section 8 of the new Act is made. An application before a Court under Section 8 merely brings to the Court's notice that the subject matter of the action before it is the subject matter of an arbitration agreement. This would not be such an application as contemplated under Section 42 of the Act as the Court trying the action may or may not have had jurisdiction to try the suit to start with or be the competent Court within the meaning of Section 2(e) of the new Act."

Learned counsel for the petitioner thereafter placed reliance on a judgment of Delhi High Court in **Omaxe Construction Ltd. Vs. Union of India &Ors. 2004 (2) Arb. LR 110 (Delhi).** Learned counsel for the petitioner also placed reliance on a judgment of Supreme Court in **Milkfood Ltd. Vs. M/s GMC Ice Cream (P) Ltd. AIR 2004 SC 3145**. He referred to paras No.76 and 77 of the said judgment, which read as under:-

"76. The learned single Judge of the High Court has proceeded on the premise that the appellant was not a claimant. The parties were ad idem that there had been a dispute between them. Only as a result of the dispute and on an apprehension consequent thereupon the suit for injunction was filed. The question is required to be gone into even in the suit as to which of the parties thereto was in breach of the contract. Such a dispute necessarily fell within the purview of the arbitration agreement. The arbitration agreement can be invoked by a part to a dispute and not only by a person who has a claim against the other. The law does not say that only a party who has a monetary claim may invoke the arbitration agreement. The arbitration agreement was invoked by the appellant by filing an application under Section 34 of the Arbitration Act pursuant where to or in furtherance whereof the proceeding of the suit was stayed and the matter was directed to be referred to the arbitrator.

77. The question as to whether in the facts and circumstances of this case an order for permanent injunction should be granted or not was itself a dispute within the meaning of the arbitration agreement. Evidently the stand of the appellant was that such an injunction should not be granted. The arbitrator, having regard to the scope and purport of the reference would be entitled to determine the said dispute. It is therefore, irrelevant as to whether the appellant had any monetary claim against the respondent or

> not. The arbitrators and consequently the learned single Judge, therefore, posed a wrong question unto themselves that no defendant will save limitation for the claimant or the plaintiff and, thus, misdirected themselves in law. Subsequent reference to the two arbitrators nominated by the parties although changed constitution of the arbitral tribunal, but the same, it will bear repetition to state, would not be indicative of the commencement of the arbitral proceeding which must be construed having regard to Section 21 of the 1996 Act. Furthermore, having regard to Section 21 of the 1996 Act, the meaning to the expression commencement of the arbitration proceeding as contained in Section 21 must be interpreted in the same manner."

The proposition laid down in these authorities cannot be disputed but the petitioners cannot draw any benefit from these authorities as in all these cases there was a contractual arbitration agreement which envisaged reference of dispute to the Arbitrator concerning of dispute in connection therewith.

In the present case there is no contractual arbitration agreement in existence between the parties.

In order to appreciate the points raised by the parties in the present case it would be appropriate to refer to Section 8 of the 1996 Act which reads as under:-

> **"8. Power to refer parties to arbitration when there is an arbitration agreement.--**
>
> (1) A judicial authority before which an action is brought

> in a matter which is the subject of an arbitration agreement shall,if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration.
>
> (2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.
>
> (3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

By reading Section 8 above the contention of the learned counsel for the respondents is that in order to succeed in an application under Section 8 the judicial authority is required to see as to whether the action brought is the subject matter of arbitration agreement and therefore, the learned Trial Court was right in coming to the conclusion that the matter in dispute did not fall within the arbitration clause and therefore, no interference is called for with the order passed by the learned Trial Court. Learned counsel for the respondents placed reliance on the judgment of Hon'ble Supreme Court in the case of **Sukanya Holdings (P) Ltd. Vs. Jayesh H.Pandya and another, (2003) 5 Supreme Court Cases 531** to contend that where a suit is commenced in respect of the matter which fell partly within the arbitration agreement and partly outside and which involves parties some of whom are parties to the arbitration agreement while some are not so, then Section 8 would not be attracted.

The contention of the learned counsel for the respondents was

that the word 'matter' in Section 8 indicates that the entire subject-matter of the suit should be subject to arbitration agreement as there is no provision in the 1996 Act for bifurcating the suit into two parts one of which would be referred to the arbitration for adjudication and other to be decided by Civil Court.

I have heard the learned counsel for the parties and find no force in the present revision petition. The proposition of law convassed by the learned counsel for the petitioner cannot be disputed that the question about the jurisdiction of the arbitrator is required to be adjudicated by the Arbitrator alone in view of Section 16 of the Act. However, the said proposition of law cannot be extended to a case where there is no contractual arbitration agreement between the parties. The petitioner was placing reliance on Article 138 of the Articles of Association of the Company which was restricted which covered only the disputes arising out of bargain and contract etc. inter se between the parties. This arbitration agreement prima facie does not cover the matter in dispute as the same does not arise out of any bargain or contract between the parties. It would further be noticed in this case that relief is also claimed against the Registrar of Companies who is not party to the arbitration agreement between the parties and therefore, it cannot be said that there is an arbitration agreement in existence between the parties.

The bare reading of section shows that in order to succeed under Section 8 of the 1996 Act it is necessary that the subject-matter of suit should be covered by the arbitration agreement executed between the parties. Once this condition is satisfied then alone the judicial authority is required to stay the proceedings and refer the matter to the Arbitrator. In

the present case as referred to above, there is no contractual agreement between the parties on the subject-matter of dispute and therefore, the learned Trial Court was right in holding that the application under Section 8 of the 1996 Act was not maintainable.

In view of above discussion, the revision petition being devoid of any merit is dismissed accordingly.

(Vinod K.Sharma)
Judge

13.09.2006
rp